UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
	Case No. 18-12341 (SMB)
1141 Realty Owner, LLC, *et al.*	(Jointly Administered)
Reorganized Debtors	

RESPONSE TO DEBTOR'S ADDITIONAL STATEMENT OF FACTS IN OPPOSITION

Movant, TCG Debt Acquisition 2 LLC ("Lender" or "TCG") in further support of its Motion for Partial Summary Judgment submits this Response pursuant to Rule 56, Federal Rules of Civil Procedure, and Local Rule 7056 with respect to the Debtors Additional Facts asserted in its Counterstatement of Material Undisputed Facts.

A. Alleged Default Regarding Unpaid Water Charges

1. Several months after the inception of this loan in April 2015 through September 15, 2017, the Lender had access to, and control of, all of the revenue of the Debtor, with the exception of some of the food and beverage revenues. (Katchadurian Decl.3; and Ex. D to Zuckerbrod Decl., Declaration of Jagdish Vaswani, dated October 19, 2017 ("10/19/17 Vaswani Decl.")).

RESPONSE: Lender admits only that it received only what was deposited by Debtor, as shown in Lender's Transaction History.

2. Pursuant to a Cash Management Agreement, dated April 16, 2015 (Katchadurian Decl., Exhibit "A"), revenue received by the Debtor from its operations, was deposited into a Lockbox account at Wells Fargo Bank, the original servicer of the loan. The funds were then transferred by Lender into a Cash Management Account ("CMA") or Clearing Account, which was subject to the "sole dominion, control and discretion of Lender." (Katchadurian Decl.,¶4, and Ex. A, Cash Management Agreement).

RESPONSE: Lender admits only that it received only what was deposited by Debtor, as shown in Lender's Transaction History. Lender does not dispute that Clearing Account, which was subject to the "sole dominion, control and discretion of Lender," except and to the extent of any terms or conditions set forth in the Loan Agreement, CMA or related loan documents.

3. Debt service, insurance and taxes were set aside and apportioned by the Lender from the funds in the CMA into the various reserves. (Katchadurian Decl., ¶5 and Ex. B, Payment Coupon/Billing Statements).

RESPONSE: Undisputed.

4. Section 6.2.2 of the Loan Agreement required the Lender to "apply the Tax Funds to payments of Taxes required to be made by Borrower pursuant to Section 4.1.2 and under the Security Agreement."(Katchadurian Decl.,¶8, and Ex. A, Cash Management Agreement, § 6.2.2).

RESPONSE: Undisputed, except that Lender asserts such duty was predicated upon receipt of the bills under Section 6.2.2 of the Loan Agreement, which states: "Borrower shall furnish Lender with all bills, statements, and estimates for Taxes at least thirty (30) days prior to the date on which such Taxes first become payable."

5. Pursuant to Section 6(b) of the CMA, the Monthly Tax Deposit (as defined and which included water and sewer charges), was required to be paid by the Lender before anything else, including insurance and debt service. (Katchadurian Decl., ¶6, and Ex. A, Cash Management Agreement, § 6(b)).

RESPONSE: Lender disputes that the CMA defines Monthly Tax Deposit. Lender does not dispute that Section 6(b) of the CMA contained an order of priority for disbursements from the Cash Management Account, except and subject to the terms or conditions set forth in the Loan Agreement, CMA and related loan documents.

6. Every month Wells Fargo, the servicer of the loan, sent the Borrower payment coupon/billing statements indicating the amount reserved by the Lender for taxes, insurance and debt service. (Katchadurian Decl., ¶9, and Ex. B, Payment Coupon/Billing Statements).

RESPONSE: Lender does not dispute that Wells Fargo, the servicer of the loan, sent the Borrower the Payment Coupon/Billing Statements attached to the Katchadurian Decl.

7. Each month the Borrower was billed by Wells Fargo for Current Interest Due, Current Tax Due, Current Insurance Due and Current Reserves Due. Such amounts were then transferred *by the Lender* from the CMA and added to each respective Reserve. (Katchadurian Decl., ¶9).

RESPONSE: Lender states that the Payment Coupon/Billing Statements speak for themselves and admits to the transfers shown in Lenders Transaction History.

8. The amounts held in reserve by the Lender each month for Taxes and for its Reserve Escrow for the period January 2016 – September 2017, taken from the Borrower's revenue deposited in the CMA, were as follows:

Date	Tax Escrow Balance	Reserve Escrow
January 12, 2016	$7,242.87	$567,999.60
February 12, 2016	$46,487.54	$584,594.64
March 12, 2016	$85,732.21	$601,189.68
April 12, 2016	$124,976.88	$616,284.72
May 12, 2016	$164,221.55	$594,789.76
June 11, 2016	$203,466.22	$574,154.51
June 29, 2016	-$92,097.38	$574,154.51
July 12, 2016	-$28,940.28	$586,737.06
August 12, 2016	$34,216.82	$599,319.61
September 12, 2016	$97,373.92	$611,902.16
October 12, 2016	$160,531.02	$624,484.71
November 14, 2016	$223,688.12	$637,067.26
December 9, 2016	-$4,169.56	$649,649.81
January 13, 2017	$43,637.98	$662,232.36
February 10, 2017	$91,445.52	$674,814.91
March 10, 2017	$139,253.06	$687,397.46
April 7, 2017	$187,060.60	$699,980.01
May 12, 2017	$244,466.85	$712,562.56
June 9, 2017	$301,873.10	$725,145.11
July 7, 2017	$16,962.55	$833,577.02
August 11, 2017	$68,288.17	$929,832.62

(Katchadurian Decl.,¶10, and Ex. B, Payment Coupon/Billing Statements).

RESPONSE: Undisputed.

9. As of March 2016, the Tax Escrow Balance was $85,732.21. (Katchadurian Decl., ¶11, and Ex. B, Payment Coupon/Billing Statements).

RESPONSE: Undisputed

10. The Reserve Escrow Balance always had more than enough funds to cover any shortfall in the Tax Reserve and to pay any outstanding water charges. (Katchadurian Decl., ¶13, and Ex. B, Payment Coupon/Billing Statements).

RESPONSE: Disputed.

11. Neither Rialto nor Wilmington ever claimed that an Event of Default existed as a result of the Debtor's failure to pay its water or sewer charges or that there

were insufficient funds reserved for such purposes. (Katchadurian Decl.,¶14).

RESPONSE: Disputed.

12. Pursuant to paragraph 6(b)(xi) of the Cash Management Agreement, in the event there were excess funds (defined as "Excess Cash Flow") in the Cash Management Account after the payment of specific expenses, Lender was obligated to transfer such Excess Cash Flow funds to the Debtor every month for payment of the Debtor's other operating expenses. (Ex. A to Katchadurian Decl., Cash Management Agreement, § 6(b)).

RESPONSE: Disputed. The transfer of Excess Cash Flow to the Debtor is specifically subject to the conditions set forth in the CMA and the Loan Agreement, including as set forth in paragraph 6(b)(xi) of the CMA.

13. Pursuant to the Cash Management Agreement, Debtor had been depositing its revenue, less certain food and beverage receipts, into the Lockbox account maintained at Wells Fargo Bank. (Ex. D to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶4).

RESPONSE: Lender admits only that it received only what was deposited by Debtor, as shown in Lender's Transaction History.

14. In July, August and September 2017, the Lender, through its new Special Loan Servicer (Midland Loan Services), failed to transfer Excess Cash Flow to the Debtor, hindering the Debtor's ability to pay some of its other operating expenses. (Ex. D to Zuckerbrod Decl., 10/19/17 Vaswani Decl. ¶¶7-12).

RESPONSE: Disputed. Pursuant to Section 6.8.2 of the Loan Agreement and Section 6(b) of the CMA, Lender was not required to release Excess Cash Flow to the Debtor if an Event of Default had occurred.

15. Debtor needed Excess Cash Flow to pay the Hotel's operating expenses, but Kevin Semon, the representative of Midland, stated that if the Hotel needed to pay operating expenses, Mr. Vaswani should pay it from his own personal funds, which Mr. Vaswani did, in excess of $400,000. (Ex. D to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶10).

RESPONSE: Lender cannot confirm or deny what Vaswani paid from his personal funds.

16. On September 7, 2017, Mr. Semon sent an email to Vaswani indicating that he would only release the Excess Cash Flow if Debtor agreed to the appointment of a receiver for the Hotel. Mr. Semon stated:

> ... I will not recommend a funding for the OPEX at this time. If the Borrower stipulates to the appointment of a receiver

> acceptable to lender, I would release funds as warranted to the receiver to assure an efficient operation of the hotel.

(Exs. D and E to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶13, and 9/7/17 email from Kevin Semon to Jagdish Vaswani, respectively).

RESPONSE: Undisputed that the quoted language is a partial quote from the email identified.

17. On September 28, 2017, shortly after the foreclosure action was commenced, but before Wilmington's motion for a receiver was heard by the District Court, Mr. Semon sent another email to Debtor, again threatening to withhold operating funds from Debtor unless it agreed to a receiver. He stated:

> Due to the identified events of default under the note, the Lender will not fund operating expenses until there is either a mutually acceptable third party or the appointment of a receiver to operate the F&B business.

(Exs. D and F to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶14, and 9/28/17 email, respectively).

RESPONSE: Lender does not dispute the email, but denies all characterization.

18. On September 28, 2017, Mr. Semon sent another email to Debtor, stating that unless it agreed to a receiver, Mr. Vaswani, would have to use his own monies to fund the Hotel 's payment of its vendors and staff:

> The F&B concerns could be timely resolved via the receiver. I understand from our prior communications that you have supported the operating deficits at this hotel in the past noting advances totaling in excess of $200,000. I recommend that you continue to fund the operating deficits to assure the timely payment of vendors and staff.

(Exs. D and G to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶15, and 9/28/17 email, respectively).

RESPONSE: Lender does not dispute the quoted language of the email, but disputes the characterization.

B. The Alleged Default Regarding the Liquor Licenses

19. Neither the Loan Agreement nor any of the other loan documents required that the Debtor sell alcohol at the Hotel.

RESPONSE: Disputed.

20. At no time prior to September 15, 2017 had the New York State Liquor Authority ("NYSLA") revoked the "Liquor Licenses" defined in the Loan Agreement. (Exs. D and H to Zuckerbrod Decl., 10/19/17 Vaswani Decl., ¶ 9 and NYSLA website printouts, respectively).

RESPONSE: Lender is unable to confirm or deny the actions of the NYSLA.

21. The Liquor Licenses remained "active" and in full force and effect in the view of the NYSLA. (Exs. C and H to Zuckerbrod Decl., Declaration of Jagdish Vaswani, dated September 25, 2017 ("9/25/17 Vaswani Decl."), respectively).

RESPONSE: Disputed.

C. The Alleged Default Regarding the Termination of the Management Agreement

22. Rialto and Wilmington were aware that the Management Agreement expired by its stated term on December 31, 2015. (Ex. C to Zuckerbrod Decl., 9/25/17 Vaswani Decl.,¶16).

RESPONSE: Disputed.

23. Rialto and Wilmington knew and accepted the fact that the Debtor, 1141 Realty LLC, of which Mr. Chan had a 10% ownership interest through his entity, You Gotta Have Faith LLC, was self-managing the Hotel. (Ex. C to Zuckerbrod Decl., 9/25/17 Vaswani Decl.,¶18.

RESPONSE: Disputed.

24. At no time prior to September 15, 2017 had Rialto or Wilmington claimed that Debtor was in default of its loan as a result of the expiration of the Management Agreement. (Ex. C to Zuckerbrod Decl., 9/25/17 Vaswani Decl., ¶18).

RESPONSE: Disputed.

Dated: January 31, 2020

WOODS OVIATT GILMAN LLP
Co-Counsel for
TCG Debt Acquisition 2 LLC
By: */s/ William F. Savino*
Williams F. Savino
1900 Main Place Tower
Buffalo, New York 14202
(716-248-3200)

BACKENROTH FRANKEL
& KRINSKY, LLP
Co-Counsel for
TCG Debt Acquisition 2 LLC
By: */s/Mark A. Frankel*
Mark A. Frankel
800 Third Avenue
New York, New York 10022